

No. 12461

United States
Court of Appeals
for the Ninth Circuit.

SEARS, ROEBUCK & CO., a Corporation,
Appellant,
vs.

WILLIAM J. McALLISTER, as trustee in the
matter of Keith N. Vallier, whose wife is Irene
Helen Vallier, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

APR - 5 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

ELLIOTT & LEE and

FRANK HUNTER,

Attorneys for Appellant.

1162 Dexter Horton Building,
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WILLIAM J. McALLISTER,

Attorney for Appellee,

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Seattle, Washington.

In the District Court of the United States for
the Western District of Washington, Northern
Division

In Bankruptcy No. 37894

In the Matter of
KEITH N. VALLIER, whose wife is Irene Helen
Vallier, Bankrupt, #37894.

TRUSTEE'S REPORT OF EXEMPT
PROPERTY

To Van C. Griffin, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.

General Head	Particular Description	Estimated Value
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption	None	
Property claimed to be exempt by State laws, with reference to the statute creating the exemption		
1. Personal Property :		
a) Household Goods and equipment Equity interest only Rem. R. S., Sec. 563.	Located at 3227-21st Avenue West Seattle, Wash.	250.00
b) Wearing Apparel—R.R.S., Sec. 563.		250.00
2. Real Estate :		
Exempt under Rem. Rev. Stat., Sec. 552 and 553, Laws of the State of Washington. Equity interest only Declaration of Homestead filed with King County Auditor October, 1948 Receiving N. 3845427	Lot 18, Block 14 Gilman's Addition to City of Seattle, according to plat thereof, recorded in Volume 5, of plats page 93, Records of King County, Washington; situate in County of King, State of Washington Purchase price \$6950.00 Mortgage 6200.00 Bal. on mortgage 5900.00 Bankrupt's interest in prop.	1050.00

/s/ WILLIAM J. McALLISTER,
Trustee.

Dated this 6th day of November, 1948.

Receipt of copy attached.

[Endorsed]: Filed November 18, 1948.

[Title District Court and Cause.]

ORDER APPROVING TRUSTEE'S REPORT
OF EXEMPTIONS

At Seattle, in said district, on the 29th day of April, 1949.

It appearing to the Court that the trustee herein has more than ten (10) days prior to the entry of this order filed his report of exempted property in accordance with law, and no objections having been taken thereto,

It Is Ordered that the said trustee's report of exempted property be and the same hereby is, in all things confirmed, and the bankrupt's claim to exemptions is hereby allowed accordingly.

It Is Further Ordered that the property specified in such report be and the same is hereby set apart to the bankrupt as exempt and ordered delivered to said bankrupt forthwith.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 29, 1949.

[Title District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

Comes now William J. McAllister, Trustee, and respectively shows:

I.

That he is the duly qualified and acting Trustee in Bankruptcy herein.

II.

That prior hereto and during the year 1947 the Bankrupt herein entered into a conditional Sales Purchase Contract covering one Cold Spot refrigerator, one davenport, two chairs, an oil heater and one radio at a price of, to wit: Six hundred twenty-seven dollars and fifty-two cents (\$627.52), in which Sears, Roebuck and Co. of Seattle, Washington was named as vendor and four hundred fifty-four dollars and fifty-two cents (\$454.52) remains unpaid on the purchase price. That said transaction was evidenced by an agreement in writing and that title to said merchandise was reserved in said vendor pending payment of the full purchase price.

III.

That possession of said personal property was delivered to said Bankrupt during the year 1947 or prior thereto, and said contract and agreement was in writing and was never filed and indexed in the office of the County Auditor of King County, Washington, the place where said contract was completed

and negotiated and the county of the residence of the vendor and said vendee.

IV.

That vendee in said contract was adjudicated a Bankrupt in the above entitled court on the day of November, 1948 and title to said merchandise, by operation of the law, has become vested in the Trustee in Bankruptcy herein, as well as the right to receive any moneys unpaid upon the purchase price.

V.

That said vendor claims some interest in said merchandise by way of a reserve title therein or by way of a claimed right to receive any moneys remaining and unpaid on the purchase price thereof, that any claims of said vendor are adverse to the claims and title of the Trustee herein.

Wherefore, the Trustee herein prays an Order to Show Cause be entered herein requiring said Sears, Roebuck and Co., a corporation, to appear herein on a day certain and show cause why it shall not be adjudged herein that the title to said personal property hereinabove described and the right to receive the balance due on the purchase price thereof has not vested in the Trustee in Bankruptcy herein.

/s/ WILLIAM J. McALLISTER,
Trustee.

State of Washington,
County of King—ss.

William J. McAllister, being first duly sworn, on oath, deposes and says:

That he is the duly acting and qualified trustee in the above entitled estate; that he makes the foregoing Petition knowing the contents thereof, and believes the same to be true.

/s/ WILLIAM J. McALLISTER.

Subscribed and Sworn to before me this 4th day of December, 1948.

[Seal] /s/ JAMES J. KEESLING,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed December 7, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

On this 7th day of December, 1948, this matter came on regularly to be heard before Van C. Griffin, Referee in Bankruptcy, upon the presentation of a petition filed by the Trustee in Bankruptcy herein, praying that said Sears, Roebuck and Co., a corporation, be required to show cause herein why it should not be adjudged that title to the following property, one Cold Spot refrigerator, one davenport, two chairs, an oil heater, and one radio, heretofore sold by said Sears, Roebuck and Co., a corporation, to the Bankrupt herein on conditional

Sales Contract, has not fully vested in the estate herein and is not an asset subject to administration herein for the benefit of creditors herein, and likewise show cause why the estate herein shall not be entitled to receive any and all moneys remaining unpaid on the said merchandise, and show cause why the estate herein shall not be entitled to receive all moneys unpaid on the purchase price from the bankrupt herein:

And the court, having heard and considered said petition, does now Order and Direct that Sears, Roebuck and Co., a corporation, be and it is hereby ordered to show cause herein why the prayer of said petition shall not be granted; and the hearing on the return of this order to show cause be and the same is set to be heard before the undersigned, referee in Bankruptcy herein in Room 601 in the United States Court House in Seattle, Washington, on the 21st day of December, 1948 at the hour of 10 a.m. of the said day and that a copy of this order be served on said Sears, Roebuck and Co., a corporation, at least ten (10) days before the return day as named herein by registered United States mail.

Dated and entered this 9th day of Dec., 1948.

/s/ VAN C. GRIFFIN,

Referee.

Presented by:

/s/ WILLIAM J. McALLISTER,

Trustee.

[Endorsed]: Filed December 7, 1948.

[Title of District Court and Cause.]

RETURN ON ORDER TO SHOW CAUSE

Comes now Sears, Roebuck and Co., a corporation, and for return to the Order to Show Cause issued to it on the 7th day of December, 1948, in the above entitled matter and signed by Van C. Griffin, Referee, respectfully shows and alleges as follows, to-wit:

I.

That this respondent, Sears, Roebuck and Co., a corporation, is now and at all times herein mentioned was engaged in a retail merchandise business in Seattle, King County, Washington, and on the several dates hereinafter set forth delivered to Keith N. Vallier, the above named bankrupt, that certain merchandise set out opposite said respective dates under Conditional Sales Contracts as follows:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1941	Oil heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	One davenport and two chairs	314.02	23.00
Nov. 12, 1947	One Coldspot refrigerator	195.65	15.50
Dec. 23, 1947	One Radio	25.70	2.00
Apr. 12, 1948	Clothing	12.91	1.00

II.

That on each of said dates a memorandum of such sale was reduced to writing stating the terms and conditions including the rate of interest and the purchase price exclusive of interest, insurance and all other charges and thereupon signed by the vendor and the vendee.

III.

That each of said Memorandum of Conditional Sale contained the following covenant upon the part of the bankrupt, to-wit:

“Until full payment is made, I agree that title to and right of possession of the merchandise shall remain in you.”

IV.

That the said bankrupt has not made full payment of said merchandise and that the title to said merchandise has been at all times since said delivery and is now in the respondent, Sears, Roebuck and Co., under and by virtue of the laws and statutes of the State of Washington.

V.

That said merchandise consisting of household goods and personal effects is in the possession of the bankrupt. That said bankrupt has made claim in this cause to said merchandise as exempt under the laws and statutes of the State of Washington, and the respondent believes and therefore alleges that said bankrupt is entitled to have said claim of exemption to said merchandise allowed.

VI.

That said conditional sale of said merchandise does not constitute a preference under the terms and provisions of the bankruptcy act.

VII.

That title to said merchandise has never vested in the trustee of the bankrupt estate.

VIII.

That the bankrupt estate is not entitled to receive any moneys unpaid on the purchase price of said merchandise and that any allowance of any claim to said unpaid portion of the purchase price would constitute an unfair and discriminatory penalty against the respondent vendor, and would constitute a taking of the respondent's property without due process of law in contravention of the Constitution of the United States of America.

Wherefore, the respondent Sears, Roebuck and Co., respectfully prays that the petition filed by the Trustee in bankruptcy herein be dismissed and that the Referee shall find that no title to said merchandise has ever vested in the bankrupt or the Trustee or said bankrupt estate.

Respectfully submitted,

SEARS, ROEBUCK AND CO.,

a corporation,

By /s/ HENRY ELLIOTT,

Its Attorney.

ELLIOTT & LEE,

Attorneys for Sears, Roebuck
and Co.

Receipt of copy attached.

[Endorsed]: Filed December 28, 1948.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The schedules disclose that the bankrupt had purchased from Sears, Roebuck & Company certain household furniture on conditional sales contracts upon which a substantial balance was still owing, and he included this property in his claim of exemptions.

The trustee filed his report of exempt property, awarding to the bankrupt not the full legal title, but his equity interest or vendee rights to purchase the property and thereafter the Referee entered an order approving the trustee's report of exempt property.

Upon the petition of the trustee the Referee issued an order directed to Sears, Roebuck & Company to show cause why their security interest under said contracts of conditional sale was not void as to the trustee because it had not been filed, and show cause why the trustee was not entitled to be vested with the title in said property as security for the payment of the balance thereon, and why he should not receive the balance of the payments for the use and benefit of all creditors.

From the return on order to show cause and from the schedules, records, and files herein, and at the hearing, it appeared without controversy that Sears, Roebuck & Company sold and delivered to the bank-

rupt on conditional sales contracts on the dates indicated below the articles therein referred to:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1941	Oil Heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	One davenport, Two Chairs..	314.02	23.00
Nov. 12, 1947	One Coldspot Refrigerator	195.65	15.50

It further appeared that said contracts were never filed as provided by Section 3790, Remington's Revised Statutes. Section 70 C of the Bankruptcy Act provides in part as follows:

“The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists.”

Thus the trustee had the authority that a creditor would have had the day before bankruptcy to attach this property and thereby divest the security holders of whatever interest they may have had because their security had not been filed.

This conclusion is in accord with equity and justice because on the day before filing the petition in

bankruptcy, Sears, Roebuck & Company held security that was void as to creditors.

If the respondent were allowed to prevail in this contention, the result would be to rejuvenate their security rights which they had lost. In the case of *In re Farmers' Co-op Co.* 202 Fed. 1008,

"... where a conditional contract of sale was not filed as required by the state statute and was void as to subsequent creditors, it was held that the property became a part of the general estate for the benefit of all creditors. The court said, 'If that were important the files in this case show that there are creditors both prior and subsequent to the date of the conditional sale contract here involved ...' See also *Moore v. Bay*; 76 A.L.R. 1198; *Local Loan Co. v. Hunt*, 292 U.S. 234, 78 L. Ed. at page 1235.

The Referee finds and concludes that under the Bankruptcy Act and under the adjudicated cases, and upon equitable principles, the vendor's interest in the foregoing conditional sales contracts passed to, and is now vested in the trustee in bankruptcy, and he therefore is entitled to collect and receive for the use and benefit of all creditors, including the respondent, Sears, Roebuck & Company, the balance of payments owing on the contracts.

Dated at Seattle, April 28, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

ORDER ON SHOW CAUSE AS TO
SEARS, ROEBUCK & COMPANY

On the 28th day of December, 1948, this matter came on regularly to be heard before the Honorable Van C. Griffin, Referee in Bankruptcy herein, upon the return of an order to show cause heretofore served on Sears, Roebuck & Company, as shown by the records and files herein, and said respondent personally appearing by Mr. Henry Elliott, his attorney and the Trustee, William J. McAllister appearing personally herein, and it appearing to the court that said respondent is required to show cause why it shall not be adjudged and determined herein that the estate herein is the owner of One (1) oil heater, one (1) davenport, Two (2) chairs, One (1) Coldspot refrigerator, and it appearing to the court from the evidence adduced that during the year 1947 the bankrupt *here* herein agreed to purchase the said personal property from said respondent under the terms of a conditional sales contract, and that said respondent failed to cause said conditional sales contract to be filed and indexed in the office of the Auditor of King County, Washington, as provided by law, and that on divers and sundry dates more than ten days subsequent to the time that said personal property was placed in the possession of the bankrupt, various creditors of said bankrupt furnished credit to the said bankrupt; and

It further appearing to the court that said per-

sonal property is presently in the possession of the Trustee in Bankruptcy herein for the use and benefit of the estate herein, and the court being otherwise fully advised in the premises, now, Therefore,

It is Ordered, Adjudged and Decreed as follows:

1. That the sale by the said respondent to the said bankrupt was and is an absolute sale and that the absolute title to said personal property has vested in the estate herein and is subject to sale and disposal under order of court herein by the Trustee in Bankruptcy herein, in the due course of admission,

2. That the estate herein and the Trustee in Bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property and the rights of the estate are the same as respondent's would have been had they filed seasonably.

Done In Open Court this 13th day of May, 1949

/s/ VAN C. GRIFFIN,

Referee.

Presented by:

/s/ WILLIAM J. McALLISTER,

Trustee.

Receipt of copy attached.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the Above-Entitled Court; to Van C. Griffin, Esquire, Referee in Bankruptcy; to the Trustee in Bankruptcy; and to All Persons Concerned or Interested in the Above-Named Estate.

Petitioner Sears Roebuck and Company, a corporation by its undersigned attorneys of record herein, hereby take exception to the order of the referee herein entered herein on May 5, 1949, with respect to an order to show cause directed to the Petitioner; petitions for a review and reversal thereof, and respectfully represents as follows, to wit:

I.

Petitioner, Sears Roebuck and Company, is a corporation, duly organized under the laws of the state of Illinois, and now and at all times herein mentioned is and was authorized and qualified to do business under the laws of the state of Washington, having paid its annual license fees last due said state.

II.

Petitioner is aggrieved by the order entered in this matter by the referee on May 13, 1949, which order was issued pursuant to an order to show cause directed to petitioner. Your Petitioner believes and therefor avers that said order is in error in hold-

ing; that the sale by the petitioner to the Bankrupt of the following personal property on five conditional sales contracts as follows, to wit:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1949	Oil Heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	Davenport & 2 chair.....	314.02	23.00
Nov. 12, 1947	Refrigerator	195.65	15.50
Dec. 23, 1947	Radio	25.70	2.00
Apr. 12, 1948	Clothing	12.91	1.00

was absolute, and that the title to the property has vested in the estate herein and is subject to sale and disposal under order of court by the trustee in Bankruptcy, and that the trustee is entitled to receive from the bankrupt the balance due on the purchase price of said personal property, which property was claimed by, and allowed to the bankrupt as an exemption under the laws of the state of Washington. It is the contention of the Petitioner that having been claimed as an exemption by the Bankrupt, none of the title to the property has vested in the estate, and that further, the last two items above referred as sold to the Bankrupt are below the value of \$50.00 and are within the exception to the requirements of Rem. Rev. Stat. 3790.

III.

No testimony was taken nor evidence introduced in support of said order.

IV.

Petitioner immediately and timely objected to the application of said order and at all times has main-

tained an objection to the proposal to enter said order, and to the entry thereof.

Wherefore your petitioner prays that the referee prepare a certificate on review and transmit to the Honorable court all original and material papers in this matter, including:

1. Trustee's report on exemptions.
2. Order approving Trustee's report on exemptions.
3. Trustee's petition for order to show cause.
4. Order to show cause.
5. Referee's memorandum decision dated April 28, 1949.
6. Order on Show Cause entered May 13, 1949.
7. Memorandum of Authorities submitted by Petitioner.
8. Petition for review

and that said order be reviewed by a Judge in accordance with the act of Congress relating to Bankruptcy; that said order be reversed, and that the court find that the title to the said property remains in the petitioner and that the petitioner is entitled to collect from the bankrupt the balance owing on said contracts.

ELLIOTT & LEE.

By /s/ NELSON T. LEE,

Attorneys for Petitioner.

United States of America,
Western District of Washington,
County of King—ss.

Nelson T. Lee, being first duly sworn on oath,
deposes and says:

That he is one of the attorneys for Sears Roebuck and Company, a corporation, petitioner herein, and makes this verification for and on behalf of Petitioner, and is duly authorized to so do; that the matters contained herein are true and correct, to the best of affiant's belief, and that this petition for review is not prosecuted for delay, but in good faith in the belief that said order is erroneous.

/s/ NELSON T. LEE.

Subscribed and Sworn to before me this 23rd day
of May, 1949.

[Seal]: /s/ PHILIP J. WEISS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy attached.

[Endorsed]: Filed May 23, 1949.

[Title of District Court and Cause.]

SUMMARY OF THE EVIDENCE

The trustee filed a petition for order to show cause and in response to said order Sears, Roebuck & Company filed a return to order to show cause,

but no evidence was offered by either party. Upon the hearing of the issues so tendered and in oral argument before the Referee it was admitted:

1. That the oil heater, Cold Spot Refrigerator, davenport, and chairs were sold by Sears, Roebuck & Company to the bankrupts on conditional sales contract and the same was never filed.

2. That there were creditors now unpaid subsequent to the sale and delivery of the furniture.

3. That the agreed price of the radio and clothing set forth in the return was less than \$50.00 and, therefore, the trustee had no interest in those contracts.

Dated at Seattle, this 11th day of June, 1949.

/s/ VAN C. GRIFFIN,

Referee in Bankruptcy.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Lloyd L. Black,
United States District Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

In Schedule A-2 attached to the bankrupt's petition it appeared that Sears, Roebuck & Company held a conditional sale contract as security for indebtedness, and in Schedule B-5 the bankrupt

claimed his household goods as exempt. The trustee in his Report on Exemptions allowed to the bankrupt not the specific property but only the equity interest, which was the vendee's interest to purchase from Sears, Roebuck & Company, and this report was approved by the Referee.

Thereafter, the trustee filed a petition in which he recited that Sears, Roebuck & Company had sold to the bankrupt certain household furniture on conditional sale contract and that the contract was not filed as provided by statute and that, therefore, he was entitled to be subrogated to the rights of the vendor and was entitled to receive the payments from the bankrupt. In response to an order issued upon said petition, Sears, Roebuck & Company filed its return, a hearing was had, a brief was submitted, and an order was entered to the effect that the vendor's interest in conditional sale contracts under which the oil heater, davenport, two chairs, and one Coldspot Refrigerator were sold by Sears, Roebuck & Company to the bankrupts now should be vested in the trustee and the trustee alone should have the right to receive the balance owing on the contracts. Sears, Roebuck & Company have petitioned for review of this order.

Statement of the Questions Presented

In a case where a vendor under a conditional sale contract retains title as security but does not file the same as required by Remington's Revised Stat-

utes Section 3790 and there are subsequent creditors, may the Bankruptcy Court apply the provisions of Section 60 of the Bankruptcy Act and hold that the security title is voidable and on due notice order such lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the trustee?

May the same results be reached by applying to the transaction the provisions of Section 70 (c) of the Bankruptcy Act, which vests in the trustee all the rights of a creditor holding an execution because the failure of Sears, Roebuck & Company to properly file their conditional sale contract gave them no rights to intervene against the action of an attaching creditor, and so far as they are concerned that is in effect what is done when the vendor's interest in the contract is vested in the trustee as was done in this order?

Papers Transmitted

I transmit herewith the following documents:

1. Trustee's Report of Exempt Property.
2. Order Approving Trustee's Report of Exemptions.
3. Trustee's petition for order to show cause.
4. Order to Show Cause.
5. Return on Order to Show Cause.
6. Referee's Memorandum Decision.

7. Order on Show Cause as to Sears, Roebuck & Company.

8. Memorandum of Authorities.

9. Petition for Review.

10. Referee's Summary of the Evidence.

Dated this 11th day of June, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed June 11, 1949.

[Title of District Court and Cause.]

ORDER ON SEARS, ROEBUCK & COMPANY'S PETITION FOR REVIEW

On the 29th day of August, 1949, this matter came on regularly to be heard before the Honorable Lloyd L. Black, United States District Judge, upon the petition of Sears, Roebuck & Company for a Writ of Review of an Order on Show Cause of the Referee in Bankruptcy herein entered on the 5th day of May, 1949, and said Sears, Roebuck & Company appearing by and through its attorneys, Elliott & Lee and the trustee William J. McAllister appearing personally herein and the court having heard the arguments of respective counsel in the matter and having read the briefs filed herein on behalf of each party and it appearing to the

court and the court finding from the evidence adduced before it and from the referee's certificate and the record that during and about the year 1947 the bankrupt herein agreed to purchase certain personal property from said Sears, Roebuck & Company under the terms of conditional sales contracts and that said Sears, Roebuck & Company failed to cause said conditional sales contracts to be filed and indexed in the office of the auditor of King County, Washington as provided by law and that more than ten days subsequent to the time that said personal property was placed in the possession of the bankrupt various creditors of said bankrupt furnished credit to the bankrupt; and

That evidence was presented to the court and the court finding that the household furniture was worth more than Five Hundred (\$500.00) Dollars and it further appearing from the evidence and records and the court finding that the bankrupt duly claimed an exemption in the amount of Two Hundred Fifty and no/100 (\$250.00) Dollars equity interest in said household furniture, and the court being otherwise fully advised in the premises, now, Therefore,

It Is Ordered, Adjudged, and Decreed that the Order of the Referee in Bankruptcy on Show Cause entered on the 5th day of May, 1949, upon the record and the evidence before this court, be and the same is hereby sustained in all particulars and that

this order is made and based upon the records and the evidence before the court.

Done in Open Court this 13th day of December, 1949.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ WILLIAM J. McALLISTER,
Trustee.

Receipt of Copy attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

On this date this matter coming on duly and regularly upon the application of Sears, Roebuck and Co., a corporation, respondent, and it duly appearing that said respondent has this date filed herein a Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, under Rule 73 (b), from that certain Order On Sears, Roebuck and Company's Petition for Review, made and entered in this action on the 13th day of December, 1949, sustaining that certain order of the Referee in Bankruptcy on show cause, entered on the 5th day of May, 1949, and it duly appearing that said respondent Sears, Roebuck and Co. did make and cause to be entered herein exceptions to said order

for review sustaining said order of the Referee in Bankruptcy, and the court being otherwise fully advised in the premises,

Now, Therefore, It Is Hereby Ordered that said appeal be and hereby is allowed.

Done in Open Court this 11th day of January, 1950.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ NELSON T. LEE,
One of the Attorneys for the Respondent, Sears,
Roebuck and Co.

[Endorsed]: Filed January 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that Sears, Roebuck and Co., a corporation, respondent, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Order On Sears, Roebuck and Company's Petition For Review, entered in this action on the 13th day of December, 1949.

ELLIOTT & LEE,
/s/ FRANK HUNTER,
Attorneys for Respondent,
Sears, Roebuck and Co.

[Endorsed]: Filed January 11, 1950.

308 U. S. Court House

January 12, 1950.

Mr. William J. McAllister
1410 Hoge Building
Seattle, Washington

In the Matter of Keith N. Vallier,
Whose Wife Is Irene Helen Vallier,
Bankrupt, In Bankruptcy No. 37894

Dear Sir:

In accordance with Rule 73(b) of Federal Rules of Civil Procedure, we are enclosing copy of Notice of Appeal to Circuit Court of Appeals Under Rule 73(b) filed in this office January 11, 1950, by Messrs. Elliott & Lee and Frank Hunter, Attorneys for Sears, Roebuck and Co. There is also enclosed copy of Order Allowing Appeal signed by the Honorable Lloyd L. Black, Judge of the U. S. District Court, on January 11, 1950.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

By /s/ HELEN M. WHITE,
Deputy.

HMW-s
Encs.

[Endorsed] Filed January 12, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Sears, Roebuck and Co., a corporation, as principal, and Aetna Casualty and Surety Company, a corporation, as surety, acknowledge ourselves to be jointly indebted to William J. McAllister, as Trustee in the matter of Keith N. Vallier, whose wife is Irene Helen Vallier, Bankrupt, appellee in the above cause, in the sum of \$250.00, conditioned that, whereas, on the 11th day of January, 1950, the District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in that court, wherein Sears, Roebuck and Co., a corporation, was respondent, and William J. McAllister, as Trustee, was the petitioner, numbered on the civil docket as In Bankruptcy No. 37894, an order was entered against said Sears, Roebuck and Co., a corporation, respondent, affirming an order of the Referee in Bankruptcy entered on the 5th day of May, 1949, and the said Sears, Roebuck and Co., a corporation, respondent, having filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of the above obligation is such that if the said Sears, Roebuck and Co., a corporation, respondent, shall prosecute its appeal to

effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

SEARS, ROEBUCK AND CO.,
A Corporation, Principal.

By /s/ NELSON H. LEE,
One of Its Attorneys.

AETNA CASUALTY AND
SURETY CO.,
A Corporation, Surety.

[Seal] By /s/ J. L. WARNER,
Resident Vice President.

Attest:

/s/ ROBERT B. ROURKE;
Resident Asst. Secretary.

Approved this 12th day of January, 1950.

/s/ LLOYD L. BLACK,
Judge.

[Endorsed]: Filed January 12, 1950.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 37,894

In the Matter of
KEITH N. VALLIER, Whose Wife Is Irene
Helen Vallier,

Bankrupts.

Black, J.

August 29, 1949.

Appearances:

ERVIN F. DAILEY,

Attorney-at-Law for and on Behalf of
Bankrupts;

WILLIAM J. McALLISTER,

Attorney-at-Law for and on Behalf of
Trustee;

HENRY ELLIOTT,

Attorney-at-Law for and on Behalf of
Creditor, Sears, Roebuck & Co.

Be It Remembered that the above matter was
called for hearing on the certificate on review of
the Referee in Bankruptcy;

Whereupon all parties consented by oral stipula-
tion that hearing should be continued until Sep-
tember 3, 1949; and such continuance was so or-
dered by the Court.

HEARING ON REFEREE'S CERTIFICATE
ON REVIEW

Pursuant to notice, the above-entitled and numbered matter came on regularly for hearing, on this 3rd day of September, 1949, at the hour of 9:00 o'clock a.m., before the Honorable Lloyd L. Black, Judge of the above-entitled court.

Appearances:

NELSON T. LEE, ESQ., and
SHIRLEY BOYD WILLIAMS,

(Of Messrs. Elliott & Lee), appearing as
Attorneys for and on Behalf of Sears,
Roebuck;

WILLIAM J. McALLISTER, ESQ.,
Trustee, Appearing on Behalf of the
Trustee.

Thereupon, the following proceedings were had,
and evidence given, to wit: [1*]

The Court: In the matter of Keith N. Vallier,
is Mr. Vallier here?

Mr. Lee: No, he is not here. I contacted his
attorney, and I was informed that he is in Cali-
fornia.

The Court: What is that?

Mr. Lee: They are both in California.

The Court: Is the Trustee present? Who is rep-
resenting the Petitioner, Sears Roebuck?

Mr. Lee: I am. Mr. Elliott is not going to be

* Page numbering appearing at top of page of original Reporter's
Transcript.

here this morning, and I am appearing in his place.

Mr. Williams: I am also.

The Court: Are there any witnesses for Sears Roebuck?

Mr. Lee: No.

The Court: Are you ready to proceed?

Mr. Lee: Yes, Your Honor.

The Court: The Trustee may be sworn.

WILLIAM J. McALLISTER

the Trustee, being first duly sworn, was examined and testified as follows:

Questions by the Court

Q. Have you an inventory of the household goods and furniture of the bankrupt?

A. Yes, I have, Your Honor.

Q. May I see it? I am interested in it (witness hands [2] document to Court).

Q. Have you viewed the premises?

A. No, I have not.

Q. Do you know whether there is any silverware?

A. Yes, there is, I think, some silverware. As I recall, when I talked to Mr. Dailey, he told me that they bought it from an Army Surplus Store, as I recall.

Q. Do they have any pots and pans?

A. I assume that they do. I don't know.

Q. How did you arrive at the valuation of \$250.00 as the equity?

(Testimony of William J. McAllister.)

A. They have paid—the total amount of the property which has been listed by them as having, household goods and so forth, which they bought on conditional sales contract, they paid that amount.

Q. I realize that, but that merchandise that was bought on conditional contract consisted of an oil heater, one davenport, two chairs, and one Coldspot refrigerator. You do not mean to say that you think that a man and wife are living with nothing but an oil heater and one davenport and two chairs and one Coldspot refrigerator, do you?

A. Well, they have the right, as I took it, to select whatever they wanted.

Q. You think that they did not select the dining room chairs [3] and table, and kitchen chairs and kitchen table, and pots and pans and cutlery?

A. Frankly, I did not give it that thought, to be candid with you.

Q. This \$250.00 is merely supposed to represent the amount paid on these particular items?

A. That is right.

Q. What about the radio?

A. Of course, there are certain items in there which are under \$50.00.

Q. Yes, I understand, but are they claiming the radio was exempt? A. They did.

Q. Was it allowed?

A. It was by me—it was, yes.

Q. But you personally have not seen the premises? A. No, I have not.

(Testimony of William J. McAllister.)

Q. You say that you were told they had bought some things from the Army Surplus?

A. Yes, that is correct.

Q. Do you know how many beds they have?

A. No, I do not.

Q. Or how much bedding?

A. The people have not been here, frankly, that is the reason why. They were East for a short while, and then [4] they went to California, and apparently they are working down there. I have not been actually in a position to state, because this thing has been pending so long here.

Q. I see.

A. But they are coming back.

Q. Do you know whether they have had rugs and carpets, a camera, dishes and glassware, and pots and pans?

A. I cannot say.

Q. You are unable to say?

A. That is correct.

Q. All right. Now, have you seen these particular items that you have testified about?

A. No, I have not seen any items that the people have.

The Court: All right.

Mr. Lee: I just would like to ask a question or two.

The Court: You may.

Questions by Mr. Lee

Q. Are these items, Mr. McAllister, that are set out in the inventory—pardon me—which are

(Testimony of William J. McAllister.)

in the return that was made to the order to show cause, the oil heater, the davenport, the two chairs, the Coldspot refrigerator, and the radio and the clothing—the possession of those items was allowed to remain in Mr. [5] Vallier, is that right?

A. That is right.

Q. And to the best of your knowledge, he still has those? A. Yes, sir.

Q. And those items never were taken into your possession? A. No, they were not.

Mr. Lee: That is all.

The Court: I will ask a further question. Had these people been living in Seattle?

The Witness: Yes.

The Court: At the time they filed the petition?

The Witness: Yes.

The Court: Where?

The Witness: Well, offhand, I do not know the address, but I know that they were living in Seattle.

The Court: Do you have any reason to believe that they did not have the ordinary bedding and household goods, furniture, and utensils?

The Witness: No. I assume that they did, as a matter of fact.

The Court: All right. You may be excused.

(Witness excused.)

The Court: Do you wish to put on a witness on behalf of Sears Roebuck?

Mr. Lee: No, Your Honor. I believe the record will [6] speak for itself as far as we are concerned.

The Court: All right. Gentlemen, I have some inclinations that I can state now, before you argue, or, if you desire, you may argue first, and then I will give you my views. The handicap to you is that if I give you my inclinations as to the facts and the law first, you may have a harder task, but at least you will know in what respect I am right, in your opinion, or wrong, if I give you my views.

Now, which do you want? Do you want me to give you my inclinations as to facts and the law first? I have read your briefs.

Mr. Williams: Well, personally, I would prefer to have your inclinations first, Your Honor.

The Court: All right. Does anyone else have any different view?

In the matter of the Vallier case, the reasonable inference is, from the evidence and the record, that the household goods and furniture were worth more than \$800.00, exclusive of beds and bedding. Whether the radio was or was not a portion of the household goods and furniture is of minor moment, because the radio is not worth a great deal, but the reasonable inference is that the radio was part of the household goods and furniture, and must be calculated in the valuation. [7] In the Vallier case, there are only a few items that are under conditional sales contract involved in this proceeding. The radio is not involved in this proceeding, except

as I must calculate its value in arriving at the total valuation.

My recollection is that there is about \$421.00 due on just a few items. The reasonable inference is that the goods are worth sufficiently above \$421.00, or sufficiently above \$406.00, to make it worth while for the bankrupt to pay that balance. The bankrupt is anxious to pay it. In the absence of rather convincing evidence, I must conclude that the property itself is worth more than the amount due. The reasonable inference is that the bankrupt had the general items of furniture, including dishes, pots and pans, silverware, and the various other items that allow his family to exist, and I therefore must conclude that the valuation of all the household goods and furniture, exclusive of the beds and beddings at the time that he went into bankruptcy, and at the present time, exceeded \$500.00—reasonably exceeded \$500.00. To say otherwise would be to say that all the various items had a value of substantially less than \$100.00, other than the items under contract, and I doubt that it is reasonable to infer that the other items, although rather numerous [8] in number, would be of such trivial worth, and yet the bankrupt would be supplementing such trivial items with a few items of substantial value.

It would seem to me that I would not be justified in finding that the value was less than substantially over \$500.00. The record also would indicate that, because it shows that the equity was of a certain amount, and then there was a balance of some \$400.00. So that equity in all of the goods owned by

him, and the value of these goods actually owned by him, plus the balance, again exceeds \$500.00.

* * *

The Court: I think that the question of household goods and furniture exceptions, and the rights of the trustee, or the vendor under unfilled contracts, depends upon whether or not the goods as an entirety were clearly exempt, or whether all of the goods, assuming they were fully paid for, had a value in excess of \$500.00. If they have, how can the vendor say which items were exempt, and which were not exempt?

Now, I have given you gentlemen my inclinations and you may respectively argue the matter. Mr. Vallier's trustee wins, and Sears Roebuck loses in that situation.

* * *

The Court: I am very glad to give Counsel for the [9] vendors the opportunity in the Vallier and Gerteis cases, to submit authorities. As to the trustee in these two cases, the trustee of course is entitled to submit authorities persuading me that my information is correct, just as the vendor in the Woo' case may want to reassure me as to the correctness of its position.

* * *

The Court: Now, if you gentlemen would like to submit any further briefs, in view of the informal attitudes I have expressed, or the informal informations, you may. You are not bound by anything that I have said. In no respect has there been a ruling

upon anything. As I told you in the beginning, it is rather likely that my inclinations will ripen into decisions, but if you gentlemen will convince me that I am mistaken, I will not be in the slightest degree embarrassed to rule exactly to the contrary of what I have indicated.

Now, do you want to put in anything more?

Mr. Lee: I realize it is untimely, but I would like to have Mr. McAllister answer a question or two as to the value of the property.

The Court: You may. Mr. McAllister may take the stand. [10]

WILLIAM J. McALLISTER

recalled for further examination, having been previously sworn, was examined and testified as follows:

By Mr. Lee:

Q. Mr. McAllister, did you go to the Vallier home and examine the contents at all?

A. No, I did not.

Q. Do you have any reason to believe that the Vallier's have property other than their equity interest as you have described it, which would exceed the sum of \$500.00?

A. Yes, I have talked with their attorney. As I say, I didn't go out to the premises myself. I intended to. I didn't get around to it at the time when I wanted to go, when they were there. And when I did want to go out, they were not there.

I talked with their attorney, and they, of course, are purchasing the home under a mortgage, and I

(Testimony of William J. McAllister.)

assume that in that home, like in any other normal home, they must have furniture in it. They have a family.

Q. Now, as to the furniture, I believe that this amount that is owed Sears Roebuck, which was originally purchased — the entire amount was \$651.83, and as to the davenport and two chairs, did you place any valuation on that of any kind? Or, let me put it this way, has there ever been, to your knowledge, any valuation placed [11] on an itemization of these various articles of furniture?

A. You mean as——

Q. (Interposing) Individually, in other words.

A. Oh, yes, their selling price.

Q. How did you arrive at that? That was the original purchase price? A. That is right.

Q. Now, I notice that the equity that was allowed, or, rather, that the exemption that was allowed, you said, \$250.00 equity interest on goods that are being purchased on contract from Sears Roebuck." By that were you indicating that \$250.00 of the \$500.00 exemption would be consumed by their silverware, their bedding, and items other than these articles of furniture which Sears Roebuck sold, and then the remaining \$250.00 would cover these items?

A. Actually, at the time I did that, I was placing the valuation that way.

Q. I also notice that you place under Schedule B-2, \$250.00 for wearing apparel, and that was, of

(Testimony of William J. McAllister.)

course, goods that were purchased from Sears Roebuck, was it not—that is, the clothing that was purchased? A. No. As I recall it, it was not.

Q. Was there not an item of \$12.91 for wearing apparel?

The Court: I might say, Counsel, actually that is [12] not in issue in this case.

The Witness: I do not know.

Mr. Lee: All right, if Your Honor please, those are all the questions I have to ask.

The Court: Of course, the wearing apparel under our statute seems to be automatically exempt. In addition, there was no contention as to the necessity of filing a contract for wearing apparel less than \$50.00.

Mr. Lee: The point I am making is this, Your Honor. In the allowance that was made, there was set forth \$250.00 equity interest, on articles being purchased from Sears Roebuck. Now, if Your Honor is holding, as I understand Your Honor, that if they reach the point of \$500.00, then everything over that—are you holding that everything over \$500.00 is not included?

The Court: No. I am saying that when the goods were worth more than \$500.00, that they were not exempt,—none of them were exempt—except as selected and none in advance for certain, which would be selected, and there being an uncertainty as to what portion of goods would not be represented by the excess, that the vendor's lien goes to the trustee.

(Testimony of William J. McAllister.)

Mr. Lee: Well, if Your Honor please, when the schedule sets out an exemption of \$250.00, which is over two-thirds of the amount still owing, and when it is clear under our state law that a purchaser acquires no interest or no right in a conditional sales contract, and the trustee admits \$250.00 of that which is claimed, I am unable to see, in view of the way that both our State Court and Federal Courts have upheld the rule that a purchaser has acquired nothing—in other words—he has absolutely no ownership in the property—how the trustee acquires any jurisdiction.

The Court: Well, Counsel, I have carefully read your brief.

Mr. Lee: I appreciate that.

The Court: And there were two items in which to my mind are completely contradictory. There was a great deal of that brief that was indicating that it was contrary to the spirit of the exemptions that the bankrupt had to pay the trustee, because the bankrupt was supposed to have property exempt, rather than to have to pay the trustee.

As far as I am concerned, the bankrupt is exactly in the same situation, in being the trustee, as he is in being the vendor. If you had stated in your brief that the vendor was not entitled to anything from the bankrupt, I could have followed the attempted persuasion, but that argument, I felt, had no validity at [14] all, because as far as the beneficiary interest of the law in the welfare of

(Testimony of William J. McAllister.)

the bankrupt is concerned, the law does not wish the bankrupt to pay the trustee, and the law does not wish the bankrupt to have to pay the vendor. So there was no persuasion in that, and I felt that the position was completely contradictory.

Now, on the other phase the brief suggested that the trustee had no authority over the exempt property, and then said under the law of the State of Washington, and the peculiar decisions of this state, that the bankrupt had no interest in the property at all being purchased by contract. If that is true, then of course there was not anything to be exempt by the bankrupt. And, again, it seemed to me that there was a contradiction in position.

If you convince me completely that the bankrupt had no interest in that property until it was fully paid for, that no title passed at all, and no interest passed, then of course the trustee in giving the bankrupt his exemption, and his equity in that property, gave him nothing. He had no equity. And the Vendor is not helped because the trustee gave the bankrupt something that the bankrupt could not get. If the bankrupt had no equity in that property by reason of the purchase under the conditional sales contract, and there is some [15] persuasion in your argument to that effect, then of course the trustee has been too good to the bankrupt, but you are not hurt.

I have not overlooked those two propositions in your brief, and I felt that an analysis of either of

(Testimony of William J. McAllister.)

them was pregnant of hazard of your position, rather than pregnant of help.

Mr. Lee: I would like to make this inquiry of Mr. McAllister. Do you know whether Mr. Vallier will be back in a short time?

The Witness: Yes, he will be.

Mr. Lee: If Your Honor please, I do feel, in all fairness to my client, that I should ask that we be allowed to examine Mr. Vallier, if you will do that.

The Court: I am inclined to allow that. Mr. Vallier was asked to be here, and he is not here, and I do not object to his coming.

Mr. Lee: Do you know when he will return, Mr. McAllister?

The Witness: Mr. Dailey was to contact me during the week and let me know, and his secretary 'phoned me yesterday—well, as a matter of fact, I 'phoned myself, and they had not been able to contact them down there, so I do not know when they will return.

Mr. Lee: It is just a matter of a few days or weeks, is it?

The Witness: It is my understanding that they are working down there, but they are going to return. At least, that is what I have been told.

The Court: I will take the matter under advisement, setting a date for hearing Mr. Vallier, and Counsel may advise me.

The Witness: All right.

(Testimony of William J. McAllister.)

The Court: And the trustee may advise me when he is available. But as to the other matters, they are considered closed, except for briefs. I think you gentlemen all know what my inclinations are, and what I think are the reasons for the inclinations. I will give to the vendors in each instance until and including the thirtieth of this month in which to serve and file such briefs as they wish, and that includes the Vallier case.

Mr. Lee: I do not believe that we will be filing any more briefs, if Your Honor please.

The Court: I will give each of you until that time, and I will give the trustee until then, including the seventh day of October, in which to serve and file any answering briefs that the trustee wishes.

I will give to counsel for the vendors until and including the eleventh day of October to serve and file [17] any reply memoranda as said counsel might wish to present.

I am not requiring the trustee's counsel to do anything, because in each instance the trustee had only a small amount involved. There is not enough involved in the individual cases to justify the trustee or his attorney to make any more effort, and there will be not the slightest criticism by the Court of any trustee or counsel for not having answered.

The Witness: Now, with regard to your views—this may not even have anything to do with our problem, but from a practical standpoint, what is

(Testimony of William J. McAllister.)

your view in relation to the bankrupt's equity—supposing, in other words, he has a \$250.00 equity, and the amount of the property exceeds \$500.00. I am wondering where the bankrupt's equity gets into the picture. Is he allowed it?

The Court: I am inclined to say in this case where the bankrupt claims his equity, and the trustee allows it, or in this case where the trustee allows the equity, that the bankrupt is entitled to have the equity. Maybe the bankrupt trustee did not have to give him his equity. The vendor has not any right to complaint, because the trustee was more generous with the bankrupt than the trustee might have been [18] compelled to be.

My view is that exceptions are intended to be liberal, and where a bankrupt has bought goods under a conditional sales contract, and his interest in the goods is less than \$500.00, if he wants to claim it, that is proper and just that the trustee should allow it. The trustee then would be entitled to the amounts that otherwise would be paid to the vendor. In other words, I am indicating in the Vallier case, and in the Gerteis case, that the bankrupts have the equities that were allowed, and that they are to make the payments of the unpaid balance to the trustee.

(Further argument and discussion between Court and Counsel.)

(Witness excused.) [19]

Further Hearing on Referee's
Certificate on Review

October 17, 1949

The Court: In the Matter of the Keith N. Vallier, Bankruptcy, are the parties ready?

Mr. McAllister: Yes, your Honor.

Mr. Dailey: I am ready.

Mr. Lee: Yes, your Honor.

The Court: I only wished respective counsel here so that it might be determined what I am to do in the matter as to the personal appearance of Mr. Vallier. I indicated a ruling. Counsel for the petitioner wanted the privilege of having Mr. Vallier brought into Court for further examination. I said I would be willing that that be done. He [1*] has not been produced. Now, what about it? Is he to be produced, or should I make my ruling?

Mr. McAllister: Your Honor, we have endeavored to locate Mr. Vallier, and he is not within the state. As a matter of fact, no one knows where he is. His home is being purchased on a contract. He leased it to some people and the realty management firm of Burwell & Morford are taking care of it and receiving payments to take care of a mortgage. They have not heard from Mr. Vallier since last May. Mr. Lee and I went out to the premises last Friday afternoon to check the property again, and all the property is there. We appraised it for what we think it is worth, but other than that we haven't been able to do anything. Mr. Dailey in-

* Page numbering appearing at top of page of original Reporter's Transcript.

forms me he has not heard from Mr. Vallier for a long time. He has endeavored to contact him, and he is not available.

Mr. Lee: If your Honor please, I think in any event that does not affect the rights of the creditor Sears & Roebuck & Company. Frankly, I think Mr. Vallier is not trying to comply with the order of the Referee. There has been nothing done as directed previously, and no one knows where he is. We don't have the opportunity to examine him, which I think we should have. I don't think he is entitled to the relief this Court can give him.

The Court: It is not a question of his being entitled [2] to relief. There is no petition for review to set aside such exemption as he might have. He did appear before the Referee at the time designated by the Referee?

Mr. McAllister: That is correct.

Mr. Dailey: That is correct.

The Court: There seems to be no probability of the bankrupt being available for this Court. He had no reason to expect or suspect that he would be asked to come here.

(Whereupon there was discussion off the record.)

The Court: In the matter of Keith N. Vallier, bankrupt, in connection with the petition for review of the Referee's ruling, the Referee's ruling is sustained. Exception noted and allowed. Appropriate order may be presented to the Court after notice sustaining the referee.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYCE,
Official Court Reporter. [3]

[Title of District Court and Cause.]

December 13, 1949

10:00 o'Clock A.M.

EXCEPTIONS TO ORDER SUSTAINING
REFEREE IN BANKRUPTCY

The Court: In the Matter of Vallier Bankruptcy, I have had presented to me this proposed order which is in accordance with my decision. I think both of you will agree that the order is in accordance with my holding. Mr. Lee has made it very evident that he is satisfied that the Court's holding is erroneous, and Mr. Lee, I take it, you would like to except to my entry of this order.

Mr. Lee: Yes, with your Honor's permission.

The Court: You are certainly permitted so to do. Exceptions are noted and allowed.

Mr. Lee: I would like to state my exceptions if I may.

The Court: You may.

Mr. Lee: The respondent excepts to this order for the reason that there has been no evidence taken to support a finding of value. There has been no evidence, either oral or in writing, as I recall, to support any finding of value.

Secondly, under the statute, Remington's Revised Statute 563, the respondent feels that the bankrupt is entitled to a total exemption of \$750. Subsection 1 provides for clothing without a specified value. Subsection 3 provides for household goods of the value of \$500. Subsection 4 provides for \$250 in lieu of certain farm stock or animals.

Thirdly, we except to this order for the reason that the property has never at any time been in the possession of the trustee, is not now in the trustee's possession, and it is my understanding that the whereabouts of the bankrupt at the present time are unknown.

Fourthly, it is our position that this was a conditional sales contract as distinguished from a chattel mortgage. The cases that we cited to your Honor have set forth the situation where a chattel mortgage has been involved and the title was not reserved in the vendor but went into the vendee; and this is a conditional sales contract situation.

Fifthly, we feel that the trustee is not entitled to the balance due from the bankrupt which he has under the order of the receiver for the reason that the property has been claimed as exempt and has never come under the jurisdiction of the receiver;

and, also, we believe that even under the order that your Honor made providing that this fellow did, or assuming that he did obtain or claim an exemption of \$250, he is being allowed to shed the contract or the obligation to the vendor to the extent of \$250 if that amount is set over to him, and all of the items that he has were items that he purchased under the conditional sales contract.

Sixth, we except to the language in the order that during the year 1947 the bankrupt purchased these certain items. I believe we have set forth in the briefs which we have filed before the referee, also the briefs which we submitted to your Honor, that these goods were purchased between 1941 and 1947.

Then we also except for the reason that the unpaid balance on the conditional sales contract does not become a part of the bankrupt's estate, that the bankruptcy is determined as of the date of adjudication of the bankrupt, and that the referee does not have the authority to impose upon the bankrupt the duty or obligation to pay subsequent payments to hold the property of the vendor.

We also except for the reason that it is our impression or the respondent's feeling that the referee only had the authority to pass on the exemption in this case, either to allow it or disallow it.

I believe, if your Honor please, that is all the exceptions we wish to take.

The Court: The Court has heard the exceptions of Mr. Lee. I am a little surprised at his statement

that no evidence was taken because I think that the record will show that at least one witness was sworn. Is that right?

Mr. McAllister: Yes, your Honor.

The Court: I am sure there was evidence taken before the Court. I am satisfied of that. I think this is the first time the suggestion has been made that the bankrupt is entitled to the \$750 exemption, —\$500 on account of furniture and \$250 under the lieu clause. It is the bankrupt, of course, who decides whether or not he wishes to claim under the lieu clause, and what he claims. Certainly, the vendor under a conditional sales contract who chose not to file same as provided by law has no right to have that \$250 lieu clause at its election applied to the protection of the vendor. If the bankrupt is still entitled at this late date to claim the \$250 lieu exemption, I take it that the bankrupt is the one who should decide what property he wished in lieu of the livestock he apparently does not have.

I have no clear recollection as to whether or not this property was all purchased in the year 1947. Certainly, it would make no difference legally whether it was or not, and I am perfectly satisfied to interpolate it in this order, "that during and before the year 1947." Does either counsel know of any difference it makes legally?

Mr. Lee: I was, if your Honor please, just merely setting forth the——

The Court: What about it? Does it make any difference? What are the facts? Were the pur-

chases before 1947? I did have a clear recollection of this, but I haven't it presently in mind.

Mr. McAllister: I have the dates on which the collections were made. There was a mistake in one item that set forth August 25, 1941, which, of course, is an error. That date was a typographical error. As I recall, in my schedule, I think there was one error. I have all the original contracts.

The Court: Were all the purchases in 1947, or were they during and before 1947?

Mr. McAllister: They were during 1947, and one was made in 1948.

Mr. Lee: I will say this, that Mr. McAllister said there was some agreement——

Mr. McAllister: Not agreement.

Mr. Lee: ——or understanding reached that the record was in error. If that was made with Mr. Elliott, I have no knowledge of it.

The Court: I am willing to put it "that during and about the year 1947."

Mr. McAllister: They were all made not earlier than 1947, and there was one sale which was made April 12, 1948.

The Court: I will put "during and about," and I will initial it. It is not my recollection that the Court was advised it made any legal difference as to the exact dates of the contracts, it having been agreed by all parties that the contracts were not filed within the ten days or at all. So I have not carried in my memory the specific dates.

The order as presented with the interpolation of

the words "and about" in line 20 on Page 1 which reads, "during and about," which I have initialed is entered. The exceptions of Mr. Lee are noted.

You may file the order, Mr. Clerk.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK, UNITED STATES
DISTRICT COURT, TO RECORD ON APPEAL**

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, together with reporter's transcript of proceedings, as set forth below, and that said pleadings and reporter's transcript constitute the record on appeal from the order filed December 13, 1949, and entered December 14, 1949, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Debtor's Petition and Schedules, and Statement of Affairs.

2. Adjudication of Bankruptcy and Order of Reference.

3. Amended Schedule A-3.

4. Bond of Trustee William J. McAllister.

5. Letter from Referee in Bankruptcy to Clerk of Court.

6. Referee's Certificate on Review, attached to which are the following:

- 6-a. Trustee's Report of Exempt Property.

- 6-b. Order Approving Trustee's Report of Exemptions.

- 6-c. Petition for Order to Show Cause.

- 6-d. Order to Show Cause.

- 6-e. Return on Order to Show Cause.

- 6-f. Memorandum Decision.

- 6-g. Order on Show Cause as to Sears, Roebuck & Company.

6-h. Memorandum of Authorities, with statement of unpaid balances attached.

6-i. Petition for Review.

6-j. Summary of the Evidence.

7. Brief of Respondent on Petition for Review of Referee's Order Dated May 13, 1949.

8. Answering Brief of Trustee in Bankruptcy on Petition for Review of Referee's Order Dated May 13, 1949.

9. Reply Brief of Respondent to Answering Brief of Trustee in Bankruptcy on Petition for Review of Order dated May 13, 1949.

10. Notice of Presentation, by Trustee, with proposed form of Order attached.

11. Order on Sears, Roebuck & Company's Petition for Review.

12. Order Allowing Appeal.

13. Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).

14. Copy of letter from Clerk of Court to Mr. William J. McAllister.

15. Cost Bond on Appeal.

15-a. Copy of Clerk's Certificate to Transcript of Record.

16. Appellant's Designation of Contents of Record on Appeal.

17. Reporter's Transcript of Proceedings.

18. Letter from Paul P. O'Brien, Clerk, addressed to Millard P. Thomas, Clerk.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle this day of February, 1950.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy Clerk.

[Endorsed]: No. 12,461. United States Court of Appeals for the Ninth Circuit. Sears, Roebuck & Co., a Corporation, Appellant, vs. William J. McAllister, as trustee in the matter of Keith N. Vallier, whose wife is Irene Helen Vallier, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 12,461

In the Matter of:

KEITH N. VALLIER, whose wife is Irene Helen
Vallier, Bankrupt.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

The appellant in this cause intends to rely upon
the following points:

1. That the order of the District Court dated
December 13, 1949, sustaining the order of the
referee in bankruptcy on show cause, entered on
the 5th day of May, 1949, is erroneous in that:

- (a) It is contrary to the facts;
- (b) It is not supported by the evidence;
- (c) The bankrupt was not made a party to the
proceeding;
- (d) Neither the referee nor the court had juris-
diction to make the orders in question;
- (e) The decision of the court was based upon
unfounded findings and conclusions;
- (f) The order denies the bankrupt's exemptions
under the state statutes and the Bankruptcy Act;
- (g) The order attempts to bring into the bank-
rupt estate property and earnings of the bankrupt
acquired after his adjudication as bankrupt;

(h) The orders of the court and the referee attempt to make property of the appellant a part of the bankrupt estate;

(i) The orders of the referee and the court constitute an unlawful interference with the contract rights between the appellant and the bankrupt;

(j) Said orders constitute an attempt to take the property of the appellant without due process of law;

And the appellant does hereby designate the following portions of the record material to be considered on this appeal:

1. Trustee's Report of Exempt Property, dated November 6, 1948;

2. Order Approving Trustee's Report of Exemptions dated April 29, 1949;

3. Petition for Order to Show Cause dated December 4, 1948;

4. Order to Show Cause dated December 9, 1948;

5. Return on Order to Show Cause filed December 28, 1948;

6. Referee's Memorandum Decision dated April 28, 1949;

7. Order on Show Cause as to Sears, Roebuck and Co. dated May 13, 1949;

8. Petition for Review dated May 23, 1949;

9. Summary of the Evidence dated June 11, 1949;

10. Referee's Certificate on Review dated June 11, 1949;

11. Order on Sears, Roebuck and Company's Petition for Review dated December 13, 1949;

12. Order Allowing Appeal dated January 11, 1950;

13. Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed January 11, 1950;

14. Letter from the Clerk of the Court to William J. McAllister dated January 12, 1950;

15. Cost Bond on Appeal dated January 12, 1950;

16. Transcript of Testimony taken on hearing on August 29, 1949; September 3, 1949; October 17, 1949, and December 13, 1949.

/s/ ELLIOTT & LEE,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 20, 1950.

